

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson June 3, 2008

STATE OF TENNESSEE v. HAROLD E. HOUSTON, JR.

Appeal from the Criminal Court for Putnam County
No. 05-0451 Leon C. Burns, Jr., Judge

No. M2007-01324-CCA-R3-CD - Filed January 20, 2009

A Putnam County jury convicted the defendant of one count of attempted manufacture of a Schedule II controlled substance (methamphetamine), a Class D felony. After a sentencing hearing, the trial court ordered that the defendant serve 180 days in the county jail and three years on probation. The defendant appeals, arguing that (1) the trial court erred by denying the defendant's request for a continuance based on the State's failure to provide discovery in a timely manner; (2) the trial court erred by refusing to grant a mistrial based on the State's introduction of statements made by the defendant that had not been provided to defense counsel during discovery; (3) the trial court erred by failing to grant a mistrial or issue a curative instruction based on comments made by a prospective juror during voir dire; and (4) the trial court violated the defendant's Sixth Amendment rights by enhancing his sentence based on factors not found by the jury beyond a reasonable doubt. After reviewing the record, we conclude that the defendant's first three stated issues are without merit but that the trial court improperly applied an enhancement factor to the defendant's sentence. Accordingly, we affirm the defendant's conviction but remand the case to the trial court for a new sentencing hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part
and Reversed in Part; Case Remanded.**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

John Philip Parsons, Cookeville, Tennessee (on appeal); David N. Brady, District Public Defender; Alison E. Roberts, Assistant District Public Defender (at trial), for the appellant, Harold E. Houston, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; Randall A. York, District Attorney General (on appeal); Anthony J. Craighead, District Attorney General pro tempore (at trial); Joshua D. Parsons, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At trial, Detective Doug Burgess with the Putnam County Sheriff's Department testified that on the afternoon of May 12, 2005, he arrived at a house located on Tucker Ridge Road to serve the defendant with an attachment from probate court. The detective testified that the residence was "[the defendant's] father's old home place," and that his investigation led him to believe that the defendant was "in possession of" the residence when he arrived there.

Detective Burgess said that when he arrived at the residence, he saw the defendant, with whom he was familiar, working on a motorcycle outside the residence. He testified that when the defendant saw him arrive, the defendant went into the house. Detective Burgess then knocked on the door and asked the defendant to come outside. When the detective received no response, he put out a call for back-up. Twenty to twenty-five minutes later, at least four other officers arrived and surrounded the house. Detective Burgess again knocked on the door and received no answer. The officers then entered the house, with Detective Burgess observing several guns in the living room. As he proceeded through the house, the detective noticed "an odor of a chemical coming from the house." The police did not, however, find the defendant in the house. After a while, one of the deputies, J.R. Scott, informed the officers that he had located items used to make methamphetamine, so the officers left the residence.

On cross-examination, Detective Burgess said that he looked for the defendant at his father's former house because the defendant's ex-wife, who lived in a trailer next door to the house, informed the police that the defendant was living there. The detective said that he was unsure whether the defendant had any siblings who might have shared the house with the defendant. The detective said that he saw the defendant run into the house, but he did not see the defendant exit the house. Detective Burgess surmised that the defendant probably exited the house through a rear door during the time when the detective was waiting for police back-up.

Deputy J.R. Scott with the Putnam County Sheriff's Department testified that he was one of the officers who responded to the call for back-up at the residence where the defendant was believed to live. He said that upon entering the house, he noticed a strong chemical odor associated with a meth lab. The deputy, who testified he was "clan[destine] lab certified" by the Drug Enforcement Administration and had assisted in dismantling over fifty meth labs, notified the other officers that he suspected that a meth lab was located in the house and that the other deputies needed to leave. Once the deputy obtained a search warrant and other officers arrived to assist in dismantling the lab, Deputy Scott returned to the house. He testified that he found numerous items associated with a meth lab in various rooms on the main floor of the house. These items included a Bunsen burner, two large liquor bottles containing what appeared to be red phosphorus, several bottles of hydrogen peroxide, coffee filters, and two empty boxes of pseudoephedrine tablets. He testified that when he went to the house's basement, he located a large plastic tub containing what he described as a

“complete meth lab.” Specifically, he noted the tub contained items including hydrogen peroxide, iodine crystals, red phosphorus, tubing, filters, rubber gloves, stirring sticks, and a glass flask.

On cross-examination, Deputy Scott said that he also found several guns in the house, as well as clothing and other property which led him to believe that someone was living in the house. However, he was unable to determine whether the person living there was the defendant.

Sergeant Brian Whitefield with the Putnam County Sheriff’s Department testified that he was one of the officers who responded to the call for assistance on May 12, 2005. He testified that he and the other officers entered the house but later left once Deputy Scott informed them that he believed the house contained a meth lab. Sergeant Whitefield then drove away from the house. As he approached Interstate 40, he saw the defendant under a bridge. He approached the defendant, who was “[u]p in the girders of the bridge.” At that point, Sergeant Whitefield arrested the defendant.

Wanda Johnson, testifying for the defendant, said that at the time of the incident, she and the defendant were dating and living together in Lebanon. She said that the defendant, who commuted forty to forty-five minutes each way to work, would occasionally go to Cookeville to drop off some feed for the animals that were on his father’s property. Johnson testified that when she visited the property with the defendant, she never saw the defendant enter his father’s house. On cross-examination, she said that she knew someone was living in the house formerly occupied by the defendant’s father. She said that the defendant’s ex-wife and children lived in a trailer next door to the house.

The defendant testified that a man named Bob Garrett lived at his father’s former house. He stated that at the time of his arrest, he was living with Johnson in Lebanon. He testified that the day of the incident, he was on his father’s property because he was bringing feed for the animals. He said that his sons, who lived in the trailer next door to the house, would feed the animals when he brought them the feed.

The defendant denied using the house as a meth lab and denied running from the police the day of his arrest. He said that when the police found him, he was looking for his dog, who had escaped. He said that when the police found him under the bridge, he was attempting to cool off in the shade. On cross-examination, the defendant denied working on his motorcycle on the family property the day of his arrest. He said that the Interstate overpass on which the police found him was two to two-and-a-half feet above the ground; he denied the overpass was ten to fifteen feet above the ground. He said that he was not aware that the police had been attempting to serve him with legal papers.

After receiving the evidence, the jury acquitted the defendant of manufacturing a schedule II controlled substance as charged in the indictment and convicted him of the lesser included offense of attempted manufacture of a schedule II controlled substance. The defendant subsequently filed a timely notice of appeal.

ANALYSIS

Two of the defendant's stated issues on appeal concern his allegation that the State failed to follow the discovery regulations established in Rule 16 of the Tennessee Rules of Criminal Procedure. The defendant first argues that the trial court erred in failing to grant, based upon the State's alleged discovery violations, the continuance the defendant requested the day of trial. The defendant also argues that the trial court erred by failing to grant a mistrial when a State witness offered testimony regarding a purported statement by the defendant in which the defendant admitted that the house in question was his—a statement that the defendant claims he was not provided in pretrial discovery as mandated by Rule 16.

Defendant's Motion for Continuance Based Upon Alleged Noncompliance with Discovery Rules

The record reflects that on the first day of trial, before jury selection began, defense counsel informed the trial court that she had only been in possession of discovery materials for two weeks. Defense counsel expressed concern over "not having the information early enough to . . . look at the attachment. I don't know if there's something in it . . . there's perhaps a motion I can file based on the search. I haven't had it long enough to be able to look into it, Judge." Defense counsel and the assistant district attorney then began arguing the legality of the search; however, the court reporter did not transcribe the entire discussion regarding this issue.

Defense counsel argued that although the defendant "requested full discovery back in August," the State "did not provide complete discovery in this case" until two weeks before the trial was scheduled to begin. The assistant district attorney responded that the police had previously provided the district attorney's office with a copy of its file concerning this case but that "somewhere, somehow, at some point, it disappeared" He also noted that he provided the defendant with discovery as soon as the district attorney general pro tempore assigned him the case, and he said that the State was "ready to go forward." He also said that based on his review of the file, "there [were] no exculpatory statements made at any time" The trial court then announced that the trial would go forward, alerting defense counsel that "you can be on your guard to see if anything else comes in."

Rule 16 of the Tennessee Rules of Criminal Procedure establishes the rules for providing discovery in a criminal case. If a party fails to comply with a discovery request, the court may:

- (A) order that party to permit the discovery or inspection; specify its time, place and manner; and prescribe other just terms or conditions;
- (B) grant a continuance;
- (C) prohibit the party from introducing the undisclosed evidence; or
- (D) enter such other order as it deems necessary under the circumstances.

Tenn. R. Crim. P. 16(d)(2)(A)-(D). "[W]hether the defendant has been prejudiced by the failure to disclose is always a significant factor" in the court's determining an appropriate remedy. State v.

Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995) (citing State v. Baker, 751 S.W.2d 154, 160 (Tenn. Crim. App. 1987)). “[T]he burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial.” State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992).

In this case, the remedy sought by the defendant in response to the State’s purported noncompliance with Rule 16 was a continuance. “The decision whether to grant a motion for a continuance is a matter of discretion for the trial court, the denial of which will not be overturned on appeal absent a clear showing the trial court abused its discretion to the prejudice of the defendant.” State v. Russell, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999) (citing State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982); Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973)). “In order to establish an abuse of discretion, the complaining party must make a clear showing of prejudice as a result of the continuance being denied.” Id. (citing State v. Teel, 793 S.W.2d 236, 245 (Tenn. 1990)).

While the State’s admission that it provided discovery to the defendant only two weeks before trial is troubling, the defendant has not established that the State’s delay in providing discovery prejudiced him. The defendant’s Rule 16 discovery request does not appear in the record, and in his brief, the defendant fails to identify which discovery materials he sought from the State or how lack of access to these materials prejudiced him. Accordingly, we cannot conclude that the trial court abused its discretion by failing to grant the defendant’s motion for a continuance. The defendant is denied relief on this issue.

Motion for Mistrial Based on Defendant’s Statement Regarding “His” House

As relevant to the defendant’s assertion that the trial court should have declared a mistrial, the record reflects that during direct examination, Sergeant Whitefield testified that upon approaching the defendant underneath the Interstate overpass, the defendant said he “wanted to know . . . what he had done, why [the police] wanted him.” Sergeant Whitefield replied that the defendant “knew that [the police] had an attachment on him.” He further testified that the defendant “ask[ed] me what we were doing at his house,” to which Sergeant Whitefield replied, “I’m arresting you.” After cross-examining Sergeant Whitefield, defense counsel moved for a mistrial. During a jury-out hearing, counsel stated that the defendant’s purported statement was not in the discovery materials provided by the State, and she also argued that the State had not informed her of the statement’s existence at any time. The assistant district attorney responded that he had only learned about the statement the previous day, and he later stated, “I might not have gotten the exact text of the statement right, but I believe I did tell [defense counsel] about [the statement] this morning.” The trial court noted that although the statement “wouldn’t be considered to be exculpatory,” the statement was “arguably, a very incriminating statement if it is an issue about his house in this case.” The trial court denied the defendant’s motion for a mistrial but instructed the jury to disregard Sergeant Whitefield’s testimony regarding the defendant’s statement concerning the house.

When considering whether a mistrial should have been granted, this court is bound by the

principle that the decision of whether to grant a mistrial is within the sound discretion of the trial court, State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996), and the trial court's ruling will not be disturbed absent a finding of an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990). The grant of a mistrial "is usually appropriate in a criminal case only where there is a 'manifest necessity'" for such action by the trial court. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996) (citing Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977)). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." Id. (citing Arnold, 563 S.W.2d at 794). On appeal, the defendant bears the burden of establishing that a "manifest necessity" for granting a mistrial existed. Id.

Tennessee Rule of Criminal Procedure 16(a)(1)(A) provides:

Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at trial[.]

In this case, the defendant made the statement regarding "his" house during an interaction with Sergeant Whitefield. While the defendant would have known that Sergeant Whitefield was a police officer, the defendant's statement resulted from a colloquy he, and not the arresting officer, initiated. As such, the statement was not made "in response to interrogation by . . . a law-enforcement officer," and the State was not obligated to disclose it pursuant to Rule 16(a)(1)(A). See State v. Balthrop, 752 S.W.2d 104, 108 (Tenn. Crim. App. 1988). As such, we conclude that the trial court did not abuse its discretion in failing to grant a mistrial, and we deny the defendant relief on this issue.

Comments by Prospective Juror During Voir Dire

The defendant next contends that during voir dire, "one of the jurors expressed her opinion that the [a]ppellant was 'probably guilty' and . . . 'looked like a dopehead.'" The defendant argues that "these statements, standing alone were so prejudicial and egregious that [a]ppellant should have been granted a mistrial *sua sponte* by the [c]ourt." The State contends that the defendant has waived the issue on appeal by failing to raise a contemporaneous objection or request a curative instruction at the time the prospective juror made the comment.

The record reflects that during voir dire, while the entire venire was in the courtroom, the defendant's trial counsel discussed the presumption of innocence with a panel of prospective jurors. Counsel asked if anyone on the panel took issue with the presumption of innocence and believed that "because the police arrest somebody . . . they're probably guilty." One prospective juror, Ms. Hazelton, said, "everyone I've ever known in the police department, I value their opinions, and I think that they're good people, and I don't think they just arrest people just to be arresting people." Upon further questioning by counsel, Hazelton said that the defendant "looks a lot like my brother-in-law who is a dope-head, yeah." When asked if she could presume the defendant innocent, she

replied, “maybe not.” Upon further questioning by the trial court regarding the presumption of innocence, Hazelton said that she “wouldn’t want to sit on a case where I couldn’t not judge a person ahead of time without just information.” At that point, the trial court excused Hazelton. Defense counsel did not request a curative instruction at that point; rather, after stating that she “appreciate[d] Ms. Hazelton’s honesty,” she asked if “anybody else” on the panel possessed “any bias or prejudice . . . that would keep you from giving [the defendant] a fair trial.” After receiving no response, counsel began questioning the panel about another issue.

As noted above, the defendant did not object to the prospective juror’s comment at the time she made it, nor did the defendant request a curative instruction or move for a mistrial. A party’s failure to raise a contemporaneous objection generally waives the issue on appeal. See Tenn. R. App. P. 36(a) (providing that “[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”). Thus, we conclude that the defendant has waived the issue on appeal. Furthermore, as the State notes in its brief, “the potential juror did not commit any misconduct; rather, she answered a question in such a way that showed her potential bias [sic] against the defendant. A purpose of voir dire is to draw out such information.” The trial court dismissed the prejudiced potential juror, and on appeal the defendant has raised no specific assertions that any of the remaining jurors were prejudiced by the statement made during voir dire. The defendant is not entitled to relief on this issue.

Sentencing

The defendant’s final contention is that his sentence of 180 days in jail followed by a three-year probationary sentence was excessive. The defendant’s argument is based on his contention that the trial court enhanced his sentence based on a factor that was not found by a jury beyond a reasonable doubt, a violation of his Sixth Amendment right to a jury trial. The State argues that the defendant has waived this issue by raising it for the first time on appeal.

The State is correct that the defendant did not raise a Sixth Amendment-based challenge to his sentence at the sentencing hearing. This court has held that a defendant who fails to raise a Sixth Amendment-based challenge to sentencing in the trial court waives the issue and may seek relief only under “plain error” review. See State v. John William Matkin, III, No. E2005-02946-CCA-R3-CD, 2007 WL 4117362, at *11 (Tenn. Crim. App. Nov. 19, 2007), perm. app. denied, (Tenn. Apr. 7, 2008). Pursuant to the plain error doctrine, “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. Crim. P. 52(b); see Tenn. R. App. P. 36(b). In determining whether plain error review is appropriate, the following factors must be established:

- (a) The record . . . clearly establish[es] what occurred in the trial court;
- (b) a clear and unequivocal rule of law [has] been breached;
- (c) a substantial right of the accused [has] been adversely affected;

- (d) the accused did not waive the issue for tactical reasons; and
- (e) consideration of the error is “necessary to do substantial justice.”

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). On appeal, the defendant has the burden of establishing that these five factors are met. State v. Gomez, 239 S.W.3d 733, 737 (Tenn. 2007) (“Gomez II”) (citing State v. Bledsoe, 225 S.W.3d 349, 355 (Tenn. 2007)). The appellate court need not consider all five factors if any single factor indicates that relief is not warranted. Smith, 24 S.W.3d at 283.

In this case, the record clearly reflects what happened in the trial court, as the sentencing hearing transcript appears in the record. The transcript reflects that the trial court considered whether enhancement and mitigating factors applied and weighed them in arriving at a sentencing determination. We next examine whether the sentences imposed by the trial court breached a clear and unequivocal rule of law.

An appellate court’s review of sentencing is de novo on the record with a presumption that the trial court’s determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review,

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d

229, 236-37 (Tenn. 1986).

At the sentencing hearing, the trial court noted the existence of two enhancement factors: “[t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range,” based on a 1983 misdemeanor theft conviction, and “[t]he defendant had no hesitation about committing a crime when the risk to human life was high,” based on the court’s conclusion that production of methamphetamine poses serious dangers to both human life and to the environment. See Tenn. Code Ann. § 40-35-114(2), (11) (2003). The trial court also found that none of the statutory mitigating factors applied. The trial court sentenced the defendant to 180 days in the county jail, to be followed by three years probation. This effective three-and-a-half-year sentence was within the two-to-four-year range established by our criminal code for a defendant convicted of a Class D felony as a Range I, standard offender. See Tenn. Code Ann. § 40-35-112(a)(4) (2003).

The defendant committed this offense in May 2005, and no waiver of his ex post facto rights appears in the record. Accordingly, the sentencing act as it existed before the 2005 amendments applied to the defendant’s sentences. See 2005 Tenn. Pub. Act ch. 353, § 18 (for offenses committed before the July 7, 2005 enactment of revised sentencing act, former act applies unless defendant executes waiver permitting sentencing under new act). Under the former law, unless enhancement factors were present, the presumptive sentence to be imposed was the minimum in the range for a Class D felony. Tenn. Code Ann. § 40-35-210(c) (2003). The pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). However, the Tennessee Supreme Court has held that in sentences imposed pursuant to Tennessee’s former sentencing act, the trial court’s enhancement of a defendant’s sentence based on factors that had not been found by a jury beyond a reasonable doubt violated a defendant’s Sixth Amendment right to a jury trial as interpreted by the Supreme Court. Gomez II, 239 S.W.3d at 740-41 (citing Cunningham v. California, 549 U.S. 270, 275, 127 S. Ct. 856, 860 (2007)); see also Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). Thus, the trial court’s application of enhancement factor (11) to the defendant’s sentence violated a clear and unequivocal rule of law for plain error purposes.

The other plain error factors are met in this case. The trial court’s denial of the defendant’s Sixth Amendment right to have a jury determine sentence enhancement factors beyond a reasonable doubt affected a substantial right of the defendant. See Gomez II, 239 S.W.3d at 741. Additionally, the record is “silent and does not establish that the Defendant[] made a tactical decision to waive [his] Sixth Amendment claims.” Id. at 742. Finally, the record appears to indicate that in enhancing the defendant’s sentence the trial court placed greater weight on enhancement factor (11) than it did on the defendant’s previous criminal history—a history that entailed only one misdemeanor conviction that occurred over twenty years before the instant offense. Therefore, consideration of

this issue is necessary to do substantial justice.

In light of the above considerations, we conclude that the trial court's application of sentence enhancement factor (11) constituted plain error. Accordingly, we remand this case to the trial court for a new sentencing hearing.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed in part and reversed in part. The case is remanded to the trial court for a new sentencing hearing.

D. KELLY THOMAS, JR., JUDGE